No. 18875

United States
COURT OF APPEALS
for the Ninth Circuit

INTERNATIONAL BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA (AFL-CIO) and CARPENTERS' LOCAL 1849, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA,

Appellants-Appellees,

vs.

C. J. MONTAG & SONS, INC., a corporation, CARL M. HALVORSON, INC., a corporation, AUSTIN CONSTRUCTION CO., a corporation, BABLER BROS., INC., a corporation, and McLAUGHLIN, INC., a corporation,

Appellees-Appellants.

APPELLEES-APPELLANTS' BRIEF

Appeal from the United States District Court for the Eastern District of Washington, Southern Division.

HONORABLE WILLIAM J. LINDBERG, Judge.

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JURISDICTIONAL STATEMENT

The jurisdiction of the United States District Court to hear this cause was based upon the Labor Management Relations Act, 1947, Section 303(b) (29 U.S.C.

Sec. 187(b)). The jurisdiction of this court to review the District Court's decision is based upon Section 1291 of Title 28, United States Code, appeals having been taken by both plaintiffs and defendants below from all or portions of a final judgment entered on February 21, 1963 (CT 73-74).

Appellees-appellants, hereinafter called "appellees," are corporations joined together by a contract dated as of January 4, 1957, in a joint venture for the construction of a dam on a navigable river in the State of Washington. Each of the members of the joint venture is engaged in interstate commerce and their activities affect commerce within the meaning of the Labor Management Relations Act, 1947 (29 U.S.C. Sec. 142 (1)). Appellants-appellees, hereinafter called "appellants," are unincorporated associations and labor organizations, both of which represent employees in an industry affecting commerce within the meaning of the Labor Management Relations Act, 1947 (29 U.S.C. Sec. 142(1)).

References to the record on appeal in this case will be the same as those used in appellants' brief; "CT" for references to the Clerk's Transcript and "RT" for references to the Reporter's Transcripts.

STATEMENT OF THE CASE

Appellees commenced this action in the District Court seeking to recover damages resulting from a violation by appellants, hereinafter sometimes referred to as "International Union" and "Local 1849," respectively, of Section 303(a)(4) of the Labor Management Relations Act, 1947 (29 U.S.C. Sec. 187(a)(4)). This section was amended in 1959 after the commencement of this action, and is now cited as Section 303(a) (29 U.S.C. Sec. 187(a)). At the time of appellants' alleged unlawful activity, appellees were engaged as prime contractor in the performance of a contract with the United States Department of the Army, Corps of Engineers, for the construction of a multi-purpose dam on the Snake River in the State of Washington, commonly known as the Ice Harbor Dam. Work on the dam was begun in January, 1957, and completed in February, 1959 (CT 56, par. 4). The contract price was $30,000,000 (RT 523).

Construction of the dam entailed the rigging of both metal and wood forms into which concrete was poured to comprise the outer and inner shell of portions of the dam structure. Rigging involves hooking the forms onto cranes and unhooking the forms from cranes after the forms have been elevated into place. In most cases rigging also includes signalling to the operator of the crane that the forms are secured for elevation and that the form after elevation has been unsecured from the crane mechanism (CT 55, par. 1(f)).

In April, 1957, appellees assigned the work of rigging both the metal and wood forms on multi-purpose cranes to members of the Ironworkers Union Local 14 (CT 57, par. 7). This assignment was made after an investigation disclosed that the established practice in the locality was to assign the rigging of all forms on multi-purpose cranes to members of the Ironworkers Union (CT 57, par. 8).

Appellants objected to the assignment and contended that the work of rigging wood forms belonged to members of the Carpenters Union (CT 58, par. 9). At no time was there an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing rigging work at the Ice Harbor Dam project (CT 57, par. 6).

When appellees refused to comply with appellants' demands to change the assignment, all of the members of appellant Local 1849 employed by the joint venture refused, on two separate occasions, in the course of their employment to work on or otherwise handle wood forms after the same had been rigged by members of Ironworkers Union Local 14 (CT 58-59, pars. 10 and 11). The admitted object of said refusals was to force appellees to assign the disputed work to members of Local 1849 rather than to members of Local 14 (CT 30, pars. 10 and 11), and the court so found (CT 58-59, pars. 10 and 11). In the pretrial order on liability issues, it was agreed that in so refusing to work the members of Local 1849 acted in concert and were induced and

encouraged to so act by Local 1849 with the object of forcing a change in the work assignment (CT 30, par. 12).

The trial court found that the International Union participated in and encouraged the actions of Local 1849 in inducing and encouraging its members to engage in concerted refusals in the course of their employment to work on or otherwise handle wood forms rigged by members of Local 14 with the object of forcing appellees to assign said rigging work to members of Local 1849 rather than to members of Local 14 (CT 60, par. 16). The court also found that the refusals of the members to work and the inducement and encouragement thereof by appellants continued throughout the periods from June 7 to June 20, 1957 (14 days), and from September 10 to September 25, 1957 (16 days), when concrete construction work on the project was halted, and was the proximate cause of said work stoppages (CT 69, par. 1).

After the members of Local 1849 had returned to work the second time, without an adjustment of the dispute, the National Joint Board for the Settlement of Jurisdictional Disputes undertook to resolve the dispute. On November 27, 1957, it issued the following decision:

> "The hooking on, handling and signalling of all wood forms shall be assigned to carpenters. In other respects there is no basis to change the contractor's assignment. However, when not working on, hooking on, handling and signalling operations the trade shall proceed with other work as assigned by contractor." (CT 59, par. 14.)

At the time of this decision all work of rigging both wood and metal forms on multi-purpose cranes had been assigned to Ironworkers and, thereafter, appellees made no change in the assignment (CT 59, par. 15). Prior to this decision and on October 11, 1957, appellees commenced this action.

Following the trial on liability issues and on April 20, 1961, the court issued its memorandum opinion (CT 38-52) and thereafter its Findings of Fact and Conclusions of Law on Liability Issues (CT 53-61), holding that appellants' conduct violated Section 303(a)(4) of the Labor Management Relations Act, 1947, and that appellants were liable for the damages caused thereby (CT 60). Following the trial on the segregated issue of damages, the court entered its Supplemental Findings of Fact and Conclusions of Law on Remaining Issues (CT 68-72), holding that appellees had been damaged in the total amount of $204,527.55 (CT 70-71). The court also held that appellees' damages should be reduced by $40,000 in mitigation of damages (CT 82-83). A judgment for appellees in the sum of $164,527.55 was entered on February 21, 1963 (CT 73-74).

Pursuant to a stipulation between the parties concerning the method of filing briefs, this initial brief of appellees constitutes their opening brief on the issues raised by their appeal and their brief in answer to appellants' brief.

OPENING BRIEF

SPECIFICATION OF ERRORS

1. The trial court erred in concluding that the amount of damages awarded appellees should be reduced by $40,000 in mitigation of damages, for the reason that such conclusion was not supported by the evidence or by any legal or equitable theory.

2. The trial court erred in reducing the amount of damages awarded appellees for idled equipment by 50 per cent of the reasonable rental value of such equipment.

3. The trial court erred in refusing to grant appellees a reasonable profit markup on those items of damages representing additional costs incurred as a result of the work stoppages.

4. The trial court erred in failing to award appellees interest from and after the time their damages were sustained until the date of judgment.

SUMMARY OF ARGUMENT

1. The trial court's Supplemental Conclusion of Law No. 2 reducing appellees' damages by the sum of $40,000 in mitigation of damages was not supported by the evidence or by any legal or equitable theory.

A. The court's conclusion exceeded its powers since it was in conflict with the jurisdictional limitations of

Section 301, Labor Management Relations Act, 1947 (29 U.S.C. Sec. 185).

B. Appellees did not breach the collective bargaining agreement (Exhibit 1) by failing to place in effect the November 27, 1957 decision of the National Joint Board for the Settlement of Jurisdictional Disputes.

C. The facts of this case do not justify an application of either the doctrine of avoidance of damages or mitigation of damages.

2. Appellees are entitled to recover as damages for the loss of use of the equipment idled by the work stoppages the value of the loss of use measured by reasonable rental value without a 50 per cent reduction of that value because of absence of use.

3. Appellees are entitled to recover as additional damages a reasonable profit markup of ten per cent on those items of damages representing additional costs incurred as a result of the work stoppages.

4. Appellees are entitled to recover as damages interest on the amount of damages awarded at the rate of six per cent per annum from January 1, 1959, to the date of judgment, February 21, 1963.

ARGUMENT

I

The trial court's Supplemental Conclusion of Law No. 2 reducing appellees' damages by the sum of $40,000 in mitigation of damages was not supported by the evidence or by any legal or equitable theory.

A. The court's conclusion exceeded its powers since it was in conflict with the jurisdictional limitations of Section 301, Labor Management Relations Act, 1947 (29 U.S.C. Sec. 185).

The trial court's Supplemental Conclusion of Law No. 2 on Remaining Issues, as amended (CT 82-83), provided as follows:

> "Viewing defendants' cross-complaint as an independent cause of action, defendants are not entitled to recover other than nominal damages from plaintiffs as a result of said breach. However, considering the nature of this litigation and all of the surrounding circumstances of this case and the equities of the situation, it is proper and equitable that the plaintiffs' damages should be reduced by the sum of $40,000, which I find to be a reasonable amount in mitigation of damages."

This conclusion was directed to appellants' cross complaint for damages based upon appellees' alleged breach of contract and measured by the wages which would have been earned by the members of Local 1849 if the disputed work had been assigned to them (CT 33, par. 5).

The court's conclusion and the remarks made during the argument on this issue (RT 1151-1154) indicate the

court adopted appellees' argument that under the rule of *Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.,* 348 U.S. 437, 75 S. Ct. 489 (1955), it lacked jurisdiction to award appellants damages measured by wages claimed to be due individual employees of Local 1849. Appellees submit that this argument is supported by that portion of the *Westinghouse* decision which denied federal courts jurisdiction over an action by a union to enforce the uniquely personal rights of individual employees. That decision has not been impaired by the subsequent decisions of the United States Supreme Court in *Textile Workers of America* v. *Lincoln Mills,* 353 U.S. 448, 77 S. Ct. 912 (1957), holding that courts have jurisdiction under Section 301 over actions by *unions* to enforce collective bargaining agreements, and *Smith* v. *Evening News Association,* 371 U.S. 195, 83 S. Ct. 267 (1962), holding that courts have jurisdiction under Section 301 over actions by *individual employees* seeking damages for breach of collective bargaining agreements.

Despite the apparent acceptance of this rule and the finding that appellants were not entitled to recover other than nominal damages on their cross complaint, the court by indirection, awarded appellants the full amount of the damages claimed and applied the only measure of damages submitted, the wages that allegedly would have been paid to members of Local 1849 but for the breach. Appellees submit that this device of reducing the sum awarded appellees "in mitigation of damages" violated the jurisdictional limitations of Section 301.

B. Appellees did not breach the collective bargaining agreement (Exhibit 1) by failing to place in effect the November 27, 1957 decision of the National Joint Board for the Settlement of Jurisdictional Disputes.

Underlying the court's mitigation of damages theory was its Supplemental Conclusion of Law No. 1 (CT 71) that appellees breached their collective bargaining agreement with appellants by failing to place in effect the decision of the National Joint Board for the Settlement of Jurisdictional Disputes dated November 27, 1957. Appellees submit that this conclusion was erroneous.

The work which appellees assigned to the Ironworkers and which was the subject matter of the dispute involved here was the rigging of all types of materials, particularly metal and wood forms on multi-purpose cranes (Exhibits 18 and 26; CT 57, par. 7). This work was assigned to the Ironworkers as early as March 27, 1957 (Exhibit 18), after a pre-job conference at which the subject was discussed (Exhibit 8, p. 8; Exhibit 4, p. 4, 6-8; RT 885). Following this assignment, the Carpenters engaged in a work stoppage in April, 1957, which, although it is not involved here, concerned the rigging on large cranes (Exhibit 4, p. 7; RT 74-76, 885; Exhibits 19, 20, 21, 22 and 23). As a result of this work stoppage and the competing demands of the Ironworkers and Carpenters over which would be entitled to the multi-purpose rigging when it commenced, appellees made an investigation of the area practice on similar projects to determine which group of employees had performed the work of rigging forms on multi-purpose

cranes (CT 57, par. 8; RT 79, 885-886). As a result of this investigation, appellees assigned the work to the Ironworkers (Exhibit 26). This assignment was made in accordance with area practice as determined by appellees and was consistent with the practice adopted on all dams previously built in the Northwest, including McNary Dam, twenty-five miles west of the Ice Harbor job (Exhibit 26; RT 886). Appellants admitted this was the established practice on dam projects (Exhibit 5, p. 44) and the International representative never contended to the Ironworkers' representative that the assignment violated area practice (Exhibit 7, p. 47). Certainly the Ironworkers agreed that the assignment was in accordance with area practice (Exhibit 8, p. 7; Exhibit 7, pp. 28 and 47).

Local 1849 immediately objected to this assignment (Exhibit 25). When appellees failed to change the assignment, although it would have been less expensive to have done so (RT 885-886), and the Ironworkers continued to assert a claim to the work (Exhibit 8, pp. 7, 9-10), the members of Local 1849 engaged in the first work stoppage involved here. This resulted in the two competing unions dispatching international representatives to the job site for the purpose of adjusting the dispute (Exhibit 29). Various meetings were held between appellees and the unions culminating in a meeting on June 20, 1957 (Exhibit 11), at which an agreement was reached to return the men to work and settle any subsequent jurisdictional disputes without work stoppages (Exhibit 38). As a result of this meeting, appellees made certain changes in the assignment which

resulted in giving additional work of rigging wood forms to Carpenters to the extent that could be accomplished without the use of duplicate crews (Exhibit 40, p. 2; RT 875, 886-887).

The work proceeded in this manner until the latter part of August, 1957, at which time appellants' representatives sought to put in effect a tentative understanding between the International presidents concerning the rigging of wood forms on multi-purpose cranes (RT 887; Exhibit 5, pp. 41-42). This understanding (Exhibit 43) divided appellees' single work assignment into two assignments, the Carpenters taking the wood forms and the Ironworkers everything else. In effect, where wood forms were involved, the Carpenters treated the multi-purpose cranes as tools of the trade. Since the Ironworkers would never agree to composite crews (Exhibit 4, p. 8; Exhibit 8, pp. 8-9; Exhibit 11, p. 3; RT 892), the only way to put this agreement in effect was to hire and work duplicate crews on the multi-purpose cranes (RT 887). Had other crafts demanded the right to rig their own work, the result would have been chaotic (Exhibits 34 and 46). Appellees immediately protested to the National Joint Board (Exhibit 46) and stated they would not put the agreement in effect until the protest was processed (Exhibit 47).

Following the appellees' refusal to comply with the literal terms of the agreement as demanded (Exhibit 50), the second work stoppage occurred. During the work stoppage, the competing unions recognized that the agreement could not be literally applied without "feath-

erbedding" the job and directed their respective unions to work out an equitable solution (Exhibits 53 and 54). Before this meeting was held, the Carpenters were directed to return to work (Exhibits 55, 56 and 57). The meeting was subsequently held on September 26, 1957, but the parties were not able to solve the dispute (Exhibit 5, pp. 53-56; Exhibit 7, pp. 38-39; RT 888). At this meeting, Mr. Holland, the Ironworkers' representative, supported appellees' position that the agreement was impractical (Exhibit 9, p. 29). As Mr. Montag testified, the parties "worked for days there actually trying to figure out how we could give any additional wood form rigging to the Carpenters on a multiple crane without featherbedding the job" (RT 888). After "the second meeting the matter was dropped because nobody could show us how we could do this" (RT 888).

Following the September meetings, appellees' bargaining agent wired the National A.G.C. office advising that the only agreement which could be reached required the appellees to use duplicate crews on multipurpose cranes when rigging wood forms (Exhibit 9, p. 40). This wire prompted an inquiry from the Joint Board (Exhibit 9, pp. 40-41) to which Mr. Guess responded on October 2, 1957 (Exhibit 9, p. 41). Apparently on the basis of representations by both unions, the Joint Board responded on October 3, 1957, as follows:

> "This office has been assured by Ironworkers and Carpenters Internationals that it is not their intent to use duplicate crews on any rig" (Exhibit 9, p. 42).

To this wire appellees' representative replied on the same

day, expressing gratification at this assurance but also inability to understand how the two conflicting objectives could be accomplished (Exhibit 9, p. 43). A subsequent meeting on October 7, 1957, failed to resolve the dispute (Exhibit 5, p. 56, RT 891).

With this background, the Joint Board issued its decision of November 27, 1957 (CT 59, par. 14), in which it attempted to please everyone by approving a division of the single work assignment but requiring that this be done in a manner which would not require duplicate crews. With reference to the award, Chairman Mitchell testified that because of the contractors' expressed concern the Board took precautions against featherbedding by the third sentence of its award, as follows:

> "However, when not working on hooking-on, handling and signalling operations, the trades shall proceed with other work as assigned by the contractor" (Exhibit 9, p. 38).

According to Chairman Mitchell, the purpose of the above-quoted language was "so there could be no accusation of duplicating crews (Exhibit 9, p. 38). He further testified that "by that action any possible possibility of duplicate crews was eliminated" (Exhibit 9, p. 39).

This proposal for avoiding duplicate crews was wholly impracticable and would have resulted in even heavier idle-time losses than duplicate crews. As shown by the testimony of Mr. Montag, Project Manager, it was a make-work featherbedding expedient on an even grander scale. He stated:

> ". . . you can visualize a carpenter over here one hundred feet or five hundred feet away and a crew of twelve or fourteen men up in a block, and the iron workers are rigging up steel forms and they come to a point where they need one little bit of wood in the middle of this square and somebody has to call to Joe to come over and tie this on to the machine so they can get it up, and in the meantime the whole crew up above is standing around idle . . . and that is where the big cost would be . . ." (RT 890-891).

This explains why repeated attempts by the parties to place the award in effect were unsuccessful notwithstanding the Board's instructions as indicated in its telegram of December 31, 1957:

> "Both unions were instructed to assist contractor in executing work performance to eliminate any accusation of featherbedding. Cooperation is still necessary between contractor and Unions involved" (Exhibit 9, page 45).

Appellants, having obtained the award on their assurances that there would be no duplicate crews or other featherbedding practices, would prefer to ignore the issue here. They offered no evidence to contradict the testimony of Mr. Montag and objected to the questioning of Local 1849's business agent on this point by appellees (RT 744-749). Perhaps the reason for this reluctance lies in the fact that appellants' evidence in support of their $40,000 damage claim was that this would have been the cost to appellees of hiring duplicate crews. Ironically, the trial court's allowance of a $40,000 offset against appellees' damages results in giving appellants the very thing they had disclaimed any intention of requiring.

Whether the Joint Board was misled by the assurances of the unions that no featherbedding would result or engaged in a cynical attempt to compel featherbedding with duplicate crews while appearing to condemn such practices need not be determined. The net result in any event was a self-contradictory award which said in one breath to divide the work and in the next to do it without featherbedding. As such, the award was impossible of performance and accordingly neither valid nor enforceable.

Aside from the contradictory features of the award, the Board's rubber stamping of the agreement between the international unions was not in compliance with the authority given it by contract or the law governing the determination of jurisdictional disputes. The National Labor Relations Board has consistently emphasized the necessity for considering the efficiency of the employers' operations when resolving disputes in proceedings under Section 10(k) (29 U.S.C. Sec. 160(k)). *Pneumatic Tool Company,* 142 NLRB No. 48 (1963); *United Brotherhood of Carpenters, Etc., Local* 1622, 139 NLRB 591, 597 (1962); *Glaziers Local* 1778, *Brotherhood of Painters,* 137 NLRB 975, 979 (1962); *Local* 991, *International Longshoremen's Assn.,* 137 NLRB 750, 755 (1962).

Appellees submit, therefore, that they did not breach the collective bargaining agreement (Exhibit 1) by failing to place in effect the Joint Board award. Although every effort was made to comply with the award, its self-contradictory terms were impossible of perform-

ance. Furthermore, the Board exceeded its powers by rubber stamping the agreement of the unions without any effort to consider traditional criteria in resolving jurisdictional disputes. Lastly, the Board's powers were limited to deciding which of two or more competing unions was entitled to a particular work assignment. It had no authority to carve appellees' single assignment into separate parts solely to satisfy the competing unions.

C. The facts of this case do not justify an application of either the doctrine of avoidance of damages or mitigation of damages.

Assuming, arguendo, that appellees did breach their contract with appellants by failing to put in effect the Joint Board award, there is nevertheless no justification for the court's Conclusion of Law No. 2 as amended, either under the doctrine of avoidable consequences or mitigation of damages.

The rule is that the burden is on the party whose wrongful conduct caused the damages to prove that the injured party could have minimized the damages by the exercise of due care. *United States* v. *Harris,* 100 F.2d 268, 279 (9th Cir. 1938); *Burr* v. *Clark,* 30 Wn. 2d 149, 190 P.2d 769, 774 (1948); *Norm Advertising* v. *Monroe Street Lumber Co.,* 25 Wn. 2d 391, 171 P.2d 177, 182 (1946). Despite this rule appellants offered no evidence that appellees could have avoided any portion of the damages resulting from appellants' unlawful activities by complying with the Joint Board award. Of course, one of the reasons why there was no such evidence is

that it was impossible for appellees to have avoided any portion of their damages by complying with the award. That award was issued after the appellants' unlawful activity had ceased and appellees' damages had been sustained.

Any argument that appellees could have avoided the damages by complying with appellants' demands at the outset is unjustified. Appellees were entitled by contract to make the assignment and to have the work performed without interruption, notwithstanding any dispute over the assignment (Exhibit 3, p. 5, pars. 1 and 2). Furthermore, the court did not find that appellees' failure to comply with these demands constituted a breach of contract and there was no showing that appellees' failure to comply was unreasonable under the circumstances. A person is only required to use such means as are reasonable under the circumstances to avoid or minimize his damages. *International L & W Union* v. *Hawaiian Pineapple Co.,* 226 F.2d 875, 880 (9th Cir. 1955); *Ward* v. *Painters' Local Union No.* 300, 45 Wn. 2d 533, 276 P.2d 576 (1954); *Lopeman* v. *Gee,* 40 Wn. 2d 586, 245 P.2d 183 (1952); Restatement, Torts, Sec. 918, comment (c). See also, *International Longshoremen's, Etc.* v. *Juneau Spruce Corp.,* 189 F.2d 177, 191 (9th Cir. 1951).

The court's conclusion cannot, therefore, be supported on the theory that appellees could have avoided or minimized their damages.

Appellees also submit that the court's conclusion cannot be supported by an application of the doctrine of mitigation of damages, as discussed by the court

during the argument on post-trial motions (RT 1198-1201). Mitigation of damages, as distinguished from avoidance of damages, is based upon a showing that the wrongful conduct of the defendant was in good faith or reasonable under the circumstances and, although not sufficient to constitute a defense, should be considered in reduction of the plaintiff's damages. However, in tort cases, evidence of good faith and other evidence offered by the defendant in mitigation of damages can only be considered in mitigation of punitive damages, not those damages which are considered compensatory. *Beckwith* v. *Bean,* 98 U.S. 266, 276 (1878); *Bates* v. *Clark,* 95 U.S. 204 (1877); *Nesmith* v. *Alford,* 318 F.2d 110, 121 (5th Cir. 1963); *Penn* v. *Henderson,* 174 Or. 1, 146 P.2d 760 (1944). Such evidence cannot be used by the court to reduce an award of actual damages. Since the damages awarded appellees in this case were compensatory and not punitive, the doctrine of mitigation of damages is not applicable.

Furthermore, even assuming that the doctrine of mitigation of damages could be applied to reduce compensatory damages, that equitable doctrine cannot be applied here for it produces a result which is not compatible with the policy of our national labor laws.

The court, in discussing its conclusion, relied to some extent on the principles announced by the Supreme Court in *Textile Workers of America* v. *Lincoln Mills,* 353 U. S. 448, 77 S. Ct. 912 (1957) (RT 1199-1200). In that case the court held that in suits for enforcement of collective bargaining agreements brought under Section

301, Labor Management Relations Act, 1947 (29 U.S.C. Sec. 185), the substantive law to be applied is federal law which courts are to fashion from the policy of our national labor laws. If that case is applicable here at all, it requires courts to fashion only such remedies as will best effectuate the policy of our national labor laws.

Appellees submit that the application of the doctrine of mitigation of damages to this case produces a result which is inconsistent with the teachings of *Lincoln Mills* for the reason that it would encourage the settlement of jurisdictional disputes by the use of economic force rather than by the peaceful means which are consistent with national labor policy. The effect of the court's remedy is to enable a labor organization to show in mitigation that it engaged in the same unlawful conduct which the Labor Management Relations Act, 1947, sought to prevent as long as it did so for the purpose of enforcing a disputed contractual claim to work. Such a showing hardly seems to justify an application of the equitable doctrine of mitigation of damages.

Appellees submit that the court's conclusion with respect to appellants' cross complaint cannot be squared with the law or with the facts of this case on the basis of any of the theories advanced by the court and discussed above. Accordingly that portion of the court's judgment which reduced the amount of damages awarded appellees by $40,000, in mitigation of damages, should be reversed.

II

Appellees are entitled to recover as damages for the loss of use of the equipment idled by the work stoppages the value of the loss of use measured by reasonable rental value without a 50 per cent reduction of that value because of absence of use.

A portion of the damages claimed by appellees was for the loss of use of equipment which was idled during the work stoppages as a result of the work stoppages. Appellees proposed two methods of measuring the value of this loss of use. The first was rental value based on rates published by Associated Equipment Distributors (A.E.D.) applicable in 1957 (Exhibit 61). The second was cost of ownership based on the formula published by Associated General Contractors of America, Inc. (A.G.C.) applicable in 1957 (Exhibit 62). A.E.D. rates are actually rental rates which include an element of profit, whereas A.G.C. rates represent only the cost of owning the equipment (RT 452-453, 457, 474). A.G.C. rates were used by appellees in bidding for the Ice Harbor contract (RT 491).

Although the A.G.C. rates are not rental rates, the court based its award on those rates (RT 1171-1172) and found that when applied to appellees' equipment, the result was the reasonable rental value of that equipment (CT 69-70, pars. 3 and 4). With respect to the idled equipment, the court allowed rental for a period of only 30 days rather than the 35 days claimed and then reduced that amount by 50 per cent because of absence of use (RT 1145-1146, 1157; CT 71).

As discussed more fully by appellees in their answering brief, below, there can be no dispute as to the use of rental value as an appropriate measure of the value of the loss of use in a case of this type. *Denver Building and Construction Council* v. *Shore,* 287 P.2d 267 (Colo. 1955). Accord, *Local Union* 984, *Int. Bro. of Teamsters, Etc.* v. *HumKo Co.,* 287 F.2d 231 (6th Cir. 1961), *cert. denied,* 366 U.S. 962, 81 S. Ct. 1922 (1961); *Wells* v. *International Union of Operating Engineers, Local* 181, 206 F. Supp. 414, 418 (W. D. Ky. 1962), aff'd, 303 F.2d 73 (6th Cir. 1962). See also, Restatement, Torts, Section 931 (1939). This is particularly true here since there was no evidence offered by appellant of any other measure which the court could have adopted (RT 1146).

Appellees submit, however, that there was no justification for the court's reduction of 50 per cent of the reasonable rental value of this equipment on the basis of absence of use. There is absolutely no evidence in the record which supports the court's finding that such a reduction is reasonable. To the contrary, the only evidence which would justify any reduction was offered by appellees through the witness Mr. Roy F. Johnson, who testified that when equipment is rented or held on a standby basis, which eliminates the necessity of major repairs (RT 468), the A.G.C. rates would be reduced between 20 and 25 per cent (RT 466-467) and the A.E.D. rates 35 per cent (RT 467). Accordingly, to the extent the court reduced the rental value by an amount in excess of 25 per cent, its finding is contrary to the evidence and clearly erroneous.

The court's finding is also not supported by any of the cases cited above, all of which applied rental value as the measure of damages without any indication of a reduction for absence of use. To support its finding, the court mistakenly ignored these cases and apparently relied upon a series of inapposite Court of Claims cases in which rental value was used as a measure of damages and then reduced 50 per cent for absence of use. The first case in this series was *Brand Inv. Co.* v. *United States,* 58 F. Supp. 749 (Ct. of Cl. 1944), a *breach of contract* action in which the plaintiff sought damages from the government for the loss of use of equipment. The court held that the government should compensate the plaintiff an amount which it would have been required to pay if it had taken the machines for use but had not in fact used them. This the court found was the proven rental value discounted 50 per cent. The rental claimed by the plaintiff in that case was a daily rental computed at hourly rates for 109 days (58 F. Supp. at p. 755). These maximum rentals were then reduced by 50 per cent. Here the court refused to award even monthly rental rates, having adopted the A.G.C. cost of ownership rates, and then reduced that minimum rental figure by 50 per cent. Furthermore, in *Brand* there was no indication of any evidence in support of a lesser reduction. These same distinctions apply to the subsequent Court of Claims cases, all of which merely applied the rule in *Brand* without discussion. See *Warren Bros. Roads Co.* v. *United States,* 105 F. Supp. 826, 830 (Ct. of Cl. 1952), where the plaintiff relied on maximum O.P.A. rental rates which included profit; *Morrison-Knudsen*

Co. v. *United States,* 84 F. Supp. 282, 288 (Ct. of Cl. 1949), and *Henry Ericsson Co.* v. *United States,* 62 F. Supp. 312, 318 (Ct. of Cl. 1945).

On the basis of the foregoing, appellees submit that the court's finding that appellees' damages for idled equipment should be reduced by 50 per cent for absence of use is not supported by the evidence or the law.

III

Appellees are entitled to recover as additional damages a reasonable profit markup of ten per cent on those items of damages representing additional costs incurred as a result of the work stoppages.

Appellees claimed as additional damages caused by appellants' unlawful conduct a reasonable profit markup of ten per cent on certain of the damage items. A ten per cent profit markup on direct costs is a customary profit markup in the construction industry on jobs of the type involved here, and is the markup used by appellees in bidding on the Ice Harbor contract and other similar contracts (RT 509).

As a result of the delay in completing its contract, appellees incurred the additional out-of-pocket costs for overhead items and other functions which the court below awarded as damages. The allowance of these expenses does not fully compensate appellees for their damages unless they are also allowed to recover the reasonable profit markup which they could have recovered if

defendants had not interfered with their freedom to employ their labor and capital elsewhere for the period of the delay.

This reasonable profit markup which the court below held could not be allowed (CT 72, par. 4; RT 1146-1147) is the same percentage of profit markup allowed by the District Court on many of the same items of damage awarded in *Morrison-Knudsen Company, Inc.* v. *International Brotherhood of Teamsters, Etc.*, D.C.E.D. Wash. S.D., Civil No. 1105 (Supplemental Findings of Fact, paragraph I, page 3). Although defendant in that case objected to this item of damage on appeal, the award was affirmed by this Court in *International Brotherhood* v. *Morrison-Knudsen Co.*, 270 F.2d 530 (9th Cir. 1959).

IV

Appellees are entitled to recover as damages interest on the amount of damages awarded at the rate of six per cent per annum from January 1, 1959, to the date of judgment, February 21, 1963.

Appellees claimed below that they were entitled to recover, *as damages,* interest at six per cent per annum on the amount of damages awarded for the period from January 1, 1959, to the date of judgment. Six per cent per annum is the legal rate of interest in Washington. R.C.W. 19.52.010. The court denied this claim (CT 72, par. 4) for two reasons: first, that the damages were not liquidated, and, second, that the court had no discretion to award interest (RT 1147).

Although the statement is occasionally made that interest is not allowed as damages in a tort action because the amount of damages is necessarily unliquidated, an examination of the cases discussed in the annotation, Interest on Amount of Damages, 36 A.L.R.2d 337 (1954), will establish that such a statement is false. Where the tort results in injury to or detention, loss, or destruction of property, as in the instant case, the general rule is that interest can be recovered as a part of the damages even though the damages are unliquidated. 15 Am. Jur., Damages, §§ 170, 172; 36 A.L.R.2d 337 (1954); McCormick, Damages, §§ 55, 56 (1935).

Where the property has a market value or where the amount of the loss is ascertainable in light of the evidence submitted, interest is allowed as a matter of right. Where, although the loss cannot be so ascertained, it is pecuniary or material, as distinguished from personal, interest is allowed in the discretion of the trier of fact in order that the injured party will be fully compensated for the loss. Restatement, Torts, § 913(b) (1939); McCormick, Damages, § 56 (1935).

The Washington court has adopted the rule that interest as damages may be allowed as a matter of right even though the amount of the damage is unliquidated. In *Grays Harbor County* v. *Bay City Lumber Company,* 47 Wn. 2d 879, 289 P.2d 975 (1955), a conversion action, the court refused to apply the rule that damages must be ascertainable by computation or reference to a reasonably certain standard and allowed interest where the amount of the loss had to be established by opinion evidence.

The same rule was applied in *J. P. (Bum) Gibbins, Inc.* v. *Utah Home Fire Ins. Co.,* 202 F.2d 469 (10th Cir. 1953), an action to recover damages for injury to equipment caused by defendant's negligence. The court allowed interest from the time of the injury until the date of judgment, holding that the amount of loss could have been determined with reasonable accuracy as illustrated by the evidence relating to replacement and repair costs.

As noted above, where the amount of the loss is not ascertainable, many courts have adopted the rule that interest is allowed in the discretion of the trier of fact, where the loss is of a material or pecuniary nature. This rule is based on the theory that a plaintiff is entitled to full compensation for the loss sustained. The trier of fact is entitled to consider in assessing damages any factors which will enable him to determine whether equity and justice require an allowance of interest to fully compensate the plaintiff. *Miller* v. *Robertson,* 266 U.S. 243, 258, 45 S. Ct. 73, 78 (1924). See also, *Wells Laundry & Linen Supply Co.* v. *Acme Fast Freight,* 85 A.2d 907 (Conn. 1952), where the court allowed interest on the amount of damage to property from the date of the damage and said (at page 909):

> " 'The determination of whether or not interest is to be recognized as a proper element of damage is one to be made in view of the demands of justice rather than through the application of any arbitrary rule.' * * * Interest is allowable upon money found to be due for damage to property if the money has been wrongfully withheld even though the amount due was unliquidated."

Federal admiralty courts have consistently adopted this rule. Perhaps the case most closely in point here is *Yachts, Inc.* v. *The Edward F. Farrington,* 146 F. Supp. 754 (E.D. N.C. 1956), a libel for damages caused by collision, where the damages included the cost of repairs and the value of the loss of use of the ship during the period of repair. See also, *American Smelt. & Refining Co.* v. *Black Diamond S.S. Corp.,* 188 F. Supp. 790 (S.D. N.Y. 1960).

Appellees submit that they were entitled to interest, as a matter of right, on the amount of the damages awarded, all of which could have been ascertained on January 1, 1959, on the basis of the evidence submitted at the trial. In any event, as to those items which could not have been so ascertained, appellees were entitled to interest in the discretion of the court, and the court erred in holding that it had no such discretion.

ANSWERING BRIEF

SUMMARY OF ARGUMENT

1. Appellants' conduct violated Sec. 303(a)(4), Labor Management Relations Act, 1947, and gave rise to a cause of action under Section 303(b) thereof.

A. The evidence below established the existence of a continuing and active dispute between two rival unions over the work of rigging forms on multipurpose cranes.

B. In order to sustain a finding that conduct is in violation of Sec. 303(a)(4), the injured party need not establish the existence of a continuing and active dispute between competing groups of employees.

2. Appellant International Union, acting through its international representatives, participated in and encouraged the actions of appellant Local 1849, which actions were in violation of Sec. 303(a)(4), Labor Management Relations Act, 1947.

3. If appellants are entitled to any judgment on their cross complaint it cannot be for more than nominal damages.

4. Appellants' contention that the trial court's findings with respect to the damages awarded to appellees were not supported by the evidence and are erroneous cannot be sustained.

A. The evidence supported the lower court's award of damages for overhead salaries, property maintenance wages and other miscellaneous costs.

B. The evidence supported the lower court's award of damages for loss of efficiency.

C. Rental value is a proper measure of damages for loss of use of equipment.

ARGUMENT

I

Appellants' Conduct violated Sec. 303(a)(4), Labor Management Relations Act, 1947, and Gave Rise To A Cause of Action Under Section 303(b) Thereof.

A. The evidence below established the existence of a continuing and active dispute between two rival unions over the work of rigging forms on multipurpose cranes.

The first portion of appellants' brief is devoted to a discussion of the evidence which they claim supports the conclusion that the actions of appellants did not violate Section 303(a)(4), Labor Management Relations Act, 1947, for the reason that there was no continuing and active dispute between the Carpenters and the Ironworkers over the work of rigging forms on multipurpose cranes. Assuming, arguendo, that a dispute such as appellants envision is necessary, appellees submit that the evidence below established the existence of such a dispute.

As discussed in considerable detail in appellees' opening brief, above, the work which appellees assigned to the Ironworkers and which thereafter became the subject matter of the dispute was the rigging of *metal, wood and all other types of forms on multipurpose cranes.* This so-

called general rigging assignment prompted an immediate objection from appellant Local 1849 (Exhibit 25). There is no doubt that, at the time of the assignment, the Ironworkers were asserting a claim to the work on the basis of area practice (Exhibit 8, pp. 7-9) and that they had reached no agreement with the Carpenters (Exhibit 8, p. 10). Appellants argue that, thereafter, when the International unions purportedly agreed to divide this general rigging work between them, with the Carpenters taking wood forms and the Ironworkers taking all other rigging work, there was no longer any dispute cognizable under Section 303(a)(4).

Even if the Ironworkers had relinquished to the Carpenters the work of rigging wood forms, this would not support the conclusion that thereafter there was no active dispute between the two unions with respect to the work which was the subject matter of the initial assignment. The Ironworkers would never agree to composite crews (Exhibit 4, p. 8; Exhibit 8, pp. 8-9; Exhibit 11, p. 3; RT 892) and there is no dispute that they continued to demand the work of rigging everything except wood forms. Therefore, the entire purpose and effect of the so-called agreement between the two unions was to give the Carpenters the rigging work on wood forms as long as this could be done in a manner which would not reduce the number of Ironworkers required on the job (Exhibit 53). As long as this could be done, there was no particular reason for anyone to object except appellees. Any argument that appellants resolved the dispute over the work which was assigned to Ironworkers by entering into such an agreement with the competing union must be rejected.

An identical argument was rejected by the National Labor Relations Board in *Engineered Building Specialties, Inc.,* 144 NLRB No. 119 (Oct. 1963), involving a dispute between the Bricklayers and Carpenters over calking work on a building. There the employer assigned the calking work to *one* employee who was not a member of any union. The Carpenters objected to the employee doing the work with the result that the employee became a member of the Carpenters' union. When the Bricklayers discovered that the work was being done by a carpenter, they objected. Thereafter the two International Unions agreed that the calking work should be divided equally among the members of each union. Since there was only one employee doing the work, the employer refused to accept the agreement for the same obvious reason that appellees refused here. The employer later assigned a second non-union employee to the work and the Bricklayers picketed the job.

In the Board proceeding under Section 10(k), Labor Management Relations Act, 1947 (29 U.S.C. Sec. 160(k)), the two unions "seemingly" took the position that their agreement constituted a voluntary adjustment of the dispute requiring a dismissal of the charge. The Board found that since the employer was not a party to the agreement, the jurisdictional dispute was not resolved by that agreement and there was, therefore, reasonable cause to believe the Bricklayers had violated Section 8(b)(4)(D) (29 U.S.C. Sec. 158(b)(4)(D)). The Board determined the dispute by assigning the work to the employee represented by the Carpenters' union.

Although appellees believe that the foregoing fore-

closes appellants' argument as a matter of law, an examination of the record in this case will demonstrate that the asserted adjustment of the dispute between the unions which would be necessary to sustain appellants' argument never existed. Certainly the dispute was not settled at the time of or during the initial work stoppage. (Exhibits 29, 31, 32, 37; Exhibit 7, pp. 27-28.) It is equally clear that after the June work stoppage and the meeting of June 20, 1957, which resulted in the Carpenters returning to work, the rigging, including the signaling, of wood forms on multipurpose cranes was still in dispute (Exhibit 5, pp. 34-35). In fact after that meeting, appellants were not only contesting the assignment of rigging wood forms on multipurpose cranes, but were protesting the assignment of steel forms (Exhibit 40). And, of course, after the meeting on June 20, 1957, the Ironworkers continued to hook on the wood and steel forms on the ground and signal them to position (Exhibit 7, p. 31; Exhibit 40; RT 875, 886-887). There was no showing that the members of Ironworkers' Local 14 who were performing this work ever agreed to relinquish it as a result of the June work stoppage. Certainly the minutes of the meeting on June 20, 1957 (Exhibit 11), and the continued performance by the Ironworkers of the rigging and signaling work on the multipurpose cranes demonstrate that the dispute was far from resolved at the conclusion of the June work stoppage.

Following the June work stoppage, the work proceeded satisfactorily in accordance with the understanding of June 20, 1957 (Exhibit 38). On August 27, 1957, appellants presented to appellees a telegram from President Hutcheson of the Carpenters purporting to show an agree-

ment between the International Unions (Exhibit 43). At that time, they advised appellees they were instructed to put this understanding in effect on the job (RT 93-94; Exhibit 5, pp. 38 and 41). On August 28, 1957, the Carpenters' representatives advised President Hutcheson that the Ironworkers' representative was refusing to meet with them to put the understanding in effect. (Exhibit 5, pp. 38-39.)

On September 5, 1957, appellees protested to the National Joint Board and advised appellants they would not put the understanding in effect until the protest was processed or an equitable settlement reached (Exhibits 46 and 47). At this time the Ironworkers were still stalling and "holding out" (Exhibit 47). Although on September 10, 1957, the Ironworkers' representative denied he was stalling, he admitted that he was also "awaiting confirmation of the copy of understanding placed in the field by the Carpenters" (Exhibit 49). On September 10, 1957, the second work stoppage began. Up to that time, the members of Ironworkers Local 14 had continued to perform the rigging work as they had done since June 20, 1957. And as late as September 13, 1957, appellees were advised by Local 14's business representative that Mr. Lyons, the Ironworkers' International president, denied the existence of any agreement (Exhibit 50).

As late as September 18, 1957, after the second work stoppage had commenced, the Carpenters' president acknowledged that the so-called agreement presented to appellees on August 27, 1957, was only a tentative agreement dependent upon an "equitable solution" and the maintenance of "the status quo insofar as man hours are

concerned" (Exhibit 53). As noted above, the assurance regarding man hours obviously was in response to the Ironworkers' insistence that any agreement to divide the work was conditioned upon there being no decrease in the number of man hours worked by Ironworkers. On the basis of this understanding, the Ironworkers were also willing to work out an equitable solution (Exbibit 54). But, of course, as discussed in appellees' opening brief, no equitable solution could be reached.

On September 26, 1957, the members of Ironworkers' Local 14 had not relinquished the assignment of rigging and signaling wood forms, although "in the open" their International representative was taking the same position as the Carpenters (Exhibit 5, p. 56). This was two days after the Carpenters had returned to work as directed (Exhibits 55 and 56). In fact not even the representatives of the International Unions had reached an agreement at this time. As stated by Mr. Holland in his deposition:

> "We were not in accord, we weren't playing ourselves against the contractor, but we were not in accord and we could not agree on anything to present to the contractor. The only thing we could agree (sic) was the proposal that I made on September 26 . . ." (Exhibit 7, p. 46).

It was not until November 14, 1957, that the International Unions finally reached a definite agreement (Exhibit 8, p. 16; Exhibit 7, p. 46; Exhibit 9, p. 23) which in essence was adopted by the Joint Board. Even then it is not clear that this settled the dispute insofar as it concerned the members of Local 14 who were doing the work. Thus as late as January 13, 1958, President Lyons of the Ironworkers was threatening disciplinary action against

any members of Local 14 who refused to comply with the agreement of November 14, 1957, and the Joint Board award (Exhibit 8, pp. 19-20). Of course, none of the members of Local 14 ever complied with the agreement and so far as appellees know, no disciplinary action was taken.

Appellees submit that the foregoing evidence establishes the existence of an active and continuing dispute between two rival groups of employees over the work which appellants attempted to force appellees to assign to their members and satisfies even the criteria which appellants claim are required to establish a violation of Sec. 303(a)(4), Labor Management Relations Act, 1947.

B. In order to sustain a finding that conduct is in violation of Sec. 303(a)(4), the injured party need not establish the existence of a continuing and active dispute between competing groups of employees.

On the basis of the above evidence, appellants ask this court to reverse the lower court's conclusion and hold that the purported resolution of the dispute removed appellants' conduct from the type proscribed by Sec. 303(a)(4), Labor Management Relations Act, 1947. In support of their argument, appellants rely exclusively on decisions of the courts and the National Labor Relations Board involving the unfair labor practice and administrative provisions of Sec. 8(b)(4)(D) and Sec. 10(k), Labor Management Relations Act (29 U.S.C. Secs. 158(b)(4)(D) and 160(k)). Appellants either ignore or ask this court to overrule all relevant case authority under Sec. 303(a)(4). They also ignore the plain language of the statute which makes it unlawful to engage in the type

of activity involved here where an object thereof is "forcing or requiring any employer to assign work to employees in a particular labor organization . . . rather than to employees in another labor organization."

The principal case which appellants ask this court to overrule is *International Longshoremen's Union, Etc. v. Juneau Spruce,* 342 U.S. 237, 72 S. Ct. 235 (1952), where the Supreme Court affirmed the decision of this court reported at 189 F.2d 177 (9th Cir. 1951). This is the only case to come before the Supreme Court under Sec. 303 (a)(4). The fact that the situation involved in that case is identical to the situation which appellants claim is involved here is evidenced by this court's opinion (189 F.2d at p. 188):

> ". . . Appellee is not in the position of an employer standing neutral in a dispute between two unions. . . . Appellee has always insisted that the work be done by the Woodworkers Union, even in face of the fact that that organization was at one time willing to surrender the work to appellants . . ."

The Supreme Court made it clear that this type of activity gives rise to an action for damages under Sec. 303(a)(4) when it said (342 U.S. at p. 244):

> "The right to sue in the courts is clear, provided the pressure on the employer falls in the prescribed category which, so far as material here, is forcing or requiring him to assign particular work 'to employees in a particular labor organization' rather than to employees 'in another labor organization' or in another 'class.' Here the jurisdictional row was between the outside union and the inside union. The fact that the union of mill employees temporarily acceded to the claim of the outside group did not withdraw the dispute from the category of jurisdictional disputes

> condemned by § 303(a)(4). Petitioners, representing one union and employing outside labor, were trying to get the work which another union, employing mill labor, had. That competition for work at the expense of employers has been condemned by the Act."

In the recent case of *Local* 978, *United Brotherhood of Carpenters & Joiners* v. *Markwell,* 305 F.2d 38 (8th Cir. 1962), where the facts were as appellants assert they are here, the *Juneau Spruce* rule was adopted. There the employer sued for damages alleging violations of Sec. 303(a)(1)(2) and (4). The trial court had entered a judgment in favor of the employer on the basis of a general verdict. The appellate court reversed and remanded the case for a new trial for the reason that it found no violation of either Sec. 303(a)(1) or (2) but only of Sec. 303(a)(4). With respect to that section, the Carpenters, Local 978, contended that the facts did not establish a "true" jurisdictional dispute. As to this the court said (at page 47):

> "While §158(b)(4)(D) and its counterpart § 187(a)(4) are of particular aid in disputes involving two rival unions within an employer organization, it is clear that these sections are also applicable when the dispute might be said to be solely between an employer and a union."

Juneau Spruce has never been modified and unless it is to be overruled here, it supports the disposition of appellants' argument by the court below. The principal case which appellants rely on as overruling *Juneau Spruce* is the Supreme Court's decision in *NLRB v. Radio & Television Broadcast Eng. Union,* 364 U.S. 573, 81 S. Ct. 330 (1961), as interpreted in *Penello v. Local Union No.* 59, *Sheet Metal Workers Int. Assn.,* 195 F. Supp. 458 (D.C.

Del. 1961). Reliance is placed upon *Penello* and the other unfair labor practice cases cited by appellants despite the Supreme Court's statement in *Juneau Spruce,* which was repeated in *Radio & Television Engineers* that the remedies provided by Secs. 8(b)(4)(D) and 303(a)(4) are independent of each other and that no substantive symmetry between the two sections is required. See also, NLBR *v. Radio & Television Engineers,* 272 F.2d 713, 715 (2d Cir. 1959).

Penello, in any event, is not particularly enlightening here for it involved a fact situation clearly distinguishable from this case. *Penello* arose on a petition for injunctive relief under Sec. 10(1), Labor Management Relations Act (29 U.S.C. § 160(1)). Dupont, the employer involved, was engaged in an expansion program consisting of the modernization of existing facilities and the construction of a new plant. The sheet metal work involved in the modernization phase of the program was minor compared to the large volume of such work in the construction phase. During the modernization phase the sheet metal work was done by individuals who were not members of Local 59, the union against which the injunction was sought. Local 59 was not interested in this work but it was anxious to obtain the volume work involved in construction of the new plant. Before the volume work commenced, Local 59 began to bring pressure upon Dupont to subcontract the work to a contractor who would employ members of Local 59. Since this involved added expense to Dupont, negotiations between Dupont and Local 59 broke down. When negotiations failed but before any assignment of the volume work was made by Dupont, Local 59 picketed the job site.

At the trial, the parties agreed that no other group of employees had made a claim for the work and the court expressly found there was no evidence that employees performing the sheet metal work on the modernization phase would have been discharged if Local 59's demands had been met. On the basis of these facts the court found that there was no dispute between rival groups of employees but solely a dispute between Dupont and Local 59. The sole purpose of the picketing was to pressure Dupont to make the initial assignment of work in favor of Local 59.

Even if it were conceded that when no work assignment has been made a labor organization is free to strike or exert other forms of economic pressure upon the prospective employer to obtain the work, it does not follow, necessarily, that once work has been assigned to one group of employees, as it was in the instant case, the labor organization representing the other group is free to engage in a strike or induce a concerted refusal to work for the purpose of forcing a change in the assignment. Therein lies the factual distinction between this case and *Penello* where no assignment had been made and the economic pressure was brought for the purpose of obtaining the initial assignment.

In any event, the result arrived at in *Penello* is questionable. On the basis of the above facts the court concluded that the conduct of Local 59 would have been a violation of Sec. 8(b)(4)(D) if that section were construed alone. However, believing that it must construe that section in conjunction with Sec. 10(k) as interpreted in *Radio & Television Eng. Union,* the court felt compelled to hold that Sec. 8(b)(4)(D) was limited to the type of

dispute which could result in a binding determination under Sec. 10(k). This necessarily meant a dispute between two competing groups of employees with the employer standing neutral. In order to reach this result, the court completely disregarded the plain language of Sec. 8(b)(4)(D).

The court could have avoided its quandary by adopting the position taken by Member Houston and Member Murdock in their respective dissents in *Moore Drydock Company,* 81 NLRB 1108, 1124 (1949), and *Juneau Spruce Corp.,* 82 NLRB 650, 660 (1949). This position was that Sec. 10(k) only comes into play in those situations where the dispute is between two groups of employees and the employer is neutral. Any other type of activity which violates Sec. 8(b)(4)(D) would invoke the normal unfair labor practice procedures. In the light of the decision in *Radio & Television Eng. Union,* these early dissents may well prove to be the proper resolution of the otherwise inevitable inconsistency between these two sections.

To our knowledge, the principles announced by the court in *Penello* have not been adopted by any other court. In fact, those principles are in conflict with such decisions as *Cuneo v. Local* 825 *Inter. Union of Operating Engineers,* 306 F.2d 394 (3rd Cir. 1962), where prior to the decision the disputing groups of employees had agreed to divide the work; *Vincent v. Steamfitters Local Union* 395, *Etc.,* 288 F.2d 276 (2d Cir. 1961), where the dispute was between the union and the employer who had assigned the work to nonunion employees and *McLeod v. Truck Drivers, Chauffeurs & Helpers Local No.* 282, 210 F. Supp.

769 (S.D. N.Y. 1962), where the dispute was between the employer and the union. Furthermore, *Schauffler v. Local* 1291, *International Longshoremen's Assn.,* 292 F.2d 182 (3rd Cir. 1961), appears to be in conflict despite the attempt by the court in *Penello* to distinguish it (195 F. Supp. p. 473, ftn. 86). The opinion of the district court in *Schauffler,* 188 F. Supp. 203, 213 (E.D. Penn. 1960), indicates that the labor organization involved there made the same argument which appellants make here. That argument was rejected by the courts and the National Labor Relations Board subsequently found a violation of Sec. 8(b)(4)(D), 142 NLRB No. 137 (1963).

In fact, the situation involved in *Schauffler* was similar to the situation involved here. There, as here, the demands made upon the employer by the one union were such that acquiescence involved hiring duplicate crews on a standby basis. Although the two unions had been involved in disputes over the work in the past, this particular action taken by the demanding union for larger crews prompted no objection from the other union since its members were still performing the work and there had been no attempt to reduce the number of its members on the job.

For most of the same reasons discussed above, appellants' reliance on *Safeway Stores, Inc.,* 134 NLRB 1320 (1961), seems to be misplaced. Only two of the five members of the Board joined in the opinion in that case which adopted the reasoning of *Penello.* Two members dissented and Member Fanning concurred for the same reason he had dissented in the original decision which is reported

at 129 NLRB 1. That reason was that the purpose of the union's strike was not to force a change in work assignments but to prevent the undermining of its representative status. In situations identical to the instant case Member Fanning sides with the two dissenting members. See, *Pittsburgh Plate Glass,* 137 NLRB 968 (1962), and *News Syndicate Co., Inc.,* 141 NLRB No. 49, 1963 CCH, NLRB Adv. Sheets, ¶ 12, 171.

Any attempt to harmonize the subsequent decisions of the National Labor Relations Board with the position announced by the two members who wrote the "majority" opinion in *Safeway* would be fruitless. Compare *Pittsburgh Plate Glass,* 137 NLRB 968 (1962), and *News Syndicate Co., Inc.,* 141 NLRB No. 49, supra, with *Hills Transportation Co.,* 136 NLRB 1086 (1962) and *Valley Sheet Metal Company,* 136 NLRB 1402 (1962).

Appellees submit that none of the decisions relied on by appellants can arguably rise to the dignity of even disputing the rule of *Juneau Spruce* and other relevant cases arising under Sec. 303(a)(4). Accordingly, the lower court's conclusion that appellants' conduct violated Sec. 303(a)(4) must be sustained.

II

Appellant International Union, Acting Through Its International Representatives, Participated In And Encouraged the Actions of Appellant Local 1849, Which Actions were In Violation of Sec. 303 (a)(4), Labor Management Relations Act, 1947.

The lower court's Finding of Fact on Liability Issues No. 16 (CT 60) provides in part:

> ". . . the court finds from the evidence introduced at the trial that the defendant International . . . , acting through its international representatives, participated in and encouraged the actions of defendant Local 1849, . . . in inducing and encouraging its members to engage in concerted refusals . . . to work . . . with the object and for the purpose of forcing . . . plaintiffs to assign . . . work to members of defendant Local 1849, rather than to members of Local 14 . . . ."

The court indicated in its opinion (CT 48) that there was sufficient evidence to support appellees' argument that Local 1849 and its business representative were authorized agents of the International Union on the basis of cases such as *International Brotherhood of Teamsters v. United States,* 275 F.2d 610 (4th Cir. 1960), cert. denied, 362 U.S. 975, 80 S. Ct. 1060 (1960), and *NLRB* v. *Millwrights' Local* 2232, *District Council, Etc.,* 277 F.2d 217 (5th Cir. 1960), cert. denied, 366 U.S. 908, 81 S. Ct. 1083 (1961). It preferred, however, to base its ruling on the participation of the International Union in carrying out the unlawful activity (CT 48).

The court noted in its opinion the facts that it felt were of particular significance in supporting this conclusion (CT 48-49) and the record is replete with evidence of the International's involvement in the unlawful activity from the beginning to the end (RT 27-186; Exhibits 20, 21, 28, 29, 37, 38, 40, 43, 44, 45, 52, 53, 55 and 56). Certainly there is evidence that the statement that President Hutcheson had directed him not to return the men to work, which was attributed to Local 1849's business agent in Exhibit 28, was made (RT 114-115, 142-143); that President Hutcheson knew of the statement (RT 177-178)

and did not deny it; that the International representative refused to return the men to work during the June stoppage until appellees met the demands (RT 116); that the men returned to work on June 20 pursuant to the agreement of the International representative (Exhibit 38) despite Mr. Brown's absence (Exhibit 11, p. 18); that the September work stoppage was precipitated by President Hutcheson's wire (Exhibit 43) which appellants advised appellees they were instructed to put in effect on the job (RT 93-94, Exhibit 5, pp. 38-41); and that the September work stoppage ceased immediately following receipt of Mr. Hutcheson's instructions (Exhibits 55 and 56).

Appellees submit that the court's finding of fact, quoted above, is supported by overwhelming evidence, is clearly not erroneous and under Rule 52(a), Fed. R. Civ. Proc., is binding upon this court. See *Lundgren v. Freeman,* 307 F.2d 104 (9th Cir. 1962).

III

If Appellants Are Entitled To Any Judgment On Their Cross Complaint, It Cannot Be For More Than Nominal Damages.

As discussed in our opening brief above (pp. 9-21), the lower court concluded that appellants were not entitled to recover a judgment on their cross complaint for more than nominal damages but that appellees' damages should be reduced by $40,000 in mitigation of damages. Appellants argued below and in their brief here that they are entitled to a judgment on their cross complaint in the amount of $40,000 measured by the wages which allegedly would have been earned by the individual members of

Local 1849 had appellees assigned the work of rigging wood forms to members of that union.

One of the arguments advanced by appellees in support of the conclusion that the court's mitigation theory was inappropriate was that appellees had not breached the collective bargaining agreement (Exhibit 1) by failing to place in effect the November 27 decision of the Joint Board. For the same reasons set forth in that argument, appellants are not entitled to recover any judgment on their cross complaint.

Even if appellees had breached the agreement, appellants would not be entitled to recover a judgment for more than nominal damages. Certainly appellants failed to show any damages which *they* sustained as a result of appellees' alleged breach of contract. Their entire evidence of damages related to the wages which would have been paid to *additional employees*. It was for this reason that the lower court concluded appellants were not entitled to recover more than nominal damages (CT 82). It would be entirely inconsistent with that conclusion for this court to award appellants a judgment for $40,000 based upon the damages allegedly sustained by the individual members of Local 1849. We submit that appellants are prevented from recoving such a judgment under the rule of *Westinghouse Salaried Employees v. Westinghouse Electric Corp.,* 348 U.S. 437, 75 S. Ct. 489 (1955). Contrary to appellants' contention, we do not believe that this phase of the court's ruling in *Westinghouse* has been impaired by *Smith v. Evening News Association,* 371 U.S. 195, 83 S. Ct. 267 (1962).

Westinghouse was an action by a *labor organization* brought under Sec. 301, Labor Management Relations Act, 1957, in which the plaintiff sought to recover on behalf of its individual members accrued wages allegedly due them under the terms of a collective bargaining agreement. Although the majority position in the case is stated in three separate opinions, six of the eight members of the court who participated supported the minimal holding that Sec. 301 did not confer upon federal courts jurisdiction over an action by a union to enforce the uniquely personal rights of individual employees. Although the Supreme Court in *Textile Workers of America v. Lincoln Mills,* 353 U.S. 448, 77 S. Ct. 912 (1957), decided the constitutional questions discussed by Justice Frankfurter in *Westinghouse* adversely to his views, the court did nothing to restrict the holding of *Westinghouse.* This is made clear in the court's opinion (353 U.S. 456, ftn. 6) and in a number of cases decided subsequent to *Lincoln Mills.* See, for example, *Silverton v. Valley Transit Cement Co.,* 249 F.2d 409 (9th Cir. 1957), and *Local Lodge* 2040, *International Assn. of Machinists v. Servel, Inc.,* 268 F.2d 692 (7th Cir. 1959).

However, appellants urge that any portion of the *Westinghouse* rule that survived *Lincoln Mills* has been completely disposed of by *Smith v. Evening News Association,* 371 U.S. 195, 83 S. Ct. 267 (1962). Certainly, as a result of *Smith,* it is no longer true, as many courts had believed, that Sec. 301 confers upon federal courts no jurisdiction over an action by an *individual* employee to enforce his rights under a collective bargaining agreement. But this is the extent of the court's holding. The suit in

Smith was brought by an *individual* for himself and as assignee of 49 other similar employees. Therefore, despite the broad language used, the decision in that case does not undermine the *Westinghouse* rule that such a suit cannot be brought by a union on behalf of individual members merely because of the union's position as the collective bargaining representative of its employees.

The right to the wages that allegedly would have been paid to individual employees is a uniquely personal right. If that right has any value here, it is clear under *Smith* that it is enforceable by those individuals under Sec. 301 either in state or federal court. To allow appellants to collect a judgment measured by those same wages could result in a double recovery. Obviously, appellants suffered no such damages and since they failed to offer evidence of any damages which they sustained, the judgment sought by them must be denied.

There is a further and equally fatal defect to appellants' claim for $40,000 damages even if they were entitled to recover a judgment based on the damages sustained by the individual members of Local 1849. This is that appellants have completely failed to offer any evidence upon which such an award of damages could be based. The entire evidence in support of appellants' damage claim is contained in the report of their accountants (Exhibit 75). In addition to the fact that this evidence is both speculative and conjectural, it is clear that the computations are based on the assumption that compliance with the Joint Board award would have required appellees to hire a duplicate crew composed of Carpenters. This

is contrary to the terms of the award and the assurances of appellants that no such duplication was required. Furthermore, there is no proof that any individual member of Local 1849 lost a single day of work as a result of appellees' assignment of the disputed work. From all that appears in the record, these individuals may have been gainfully employed elsewhere during the entire period covered by appellants' claim.

IV

Appellants' Contention That the Trial Court's Findings With Respect to the Damages Awarded Appellees Were not Supported by the Evidence and Are Erroneous Cannot Be Sustained.

Appellants contend in their brief (pp. 52-59) that the trial court's findings with respect to the damages awarded appellees (CT 70-71) were not supported by the evidence and should be either "set aside or materially and substantially reduced." Their principal arguments are directed against the court's award of damages for idled equipment and for loss of efficiency. Appellees submit that the court's findings on damages were supported by the overwhelming weight of the evidence and are not clearly erroneous. As such, those findings are binding on this court. Rule 52(a), Fed. R. Civ. Proc.

The court's award of damages was based on the finding that the progress and completion of the work on the project were delayed a total of thirty-two and one-half days as a result of the two work stoppages in June and September (CT 69, par. 2). This delay resulted from two factors. First, as the parties agreed,

the two work stoppages lasted for a total period of thirty days (CT 63) and the court found that appellants' unlawful conduct continued throughout both periods (CT 69, par. 1). During these thirty days all progress in pouring concrete stopped because there were no carpenters to prepare pouring forms (RT 481).

During the June work stoppage the concrete pouring and excavation work overlapped (RT 479) and, although the excavation work continued, the concrete construction work was halted (RT 480). If the work stoppage had not occurred the concrete construction work would have continued at the same time as the excavation work was being performed. Therefore although appellants' statement that the overhead expenses in June would have continued anyhow is partially true, it fails to take into consideration the fact that those same expenses were required to be incurred again later for a period of time equal to the period of the June stoppage. Furthermore, appellees deny the claimed admission "that at the time of the June shutdown the entire work force was moved to another area" (App. Brief, p. 58). More than 25 per cent of the work force was off work by the end of the first week of the June stoppage (Exhibit 71, p. 1). During the September work stoppage, work on the entire project was halted.

Each day of interruption in concrete pouring resulted in a corresponding delay in completion of the project as a whole because the method of construction required concrete to be poured in sections on top of one another and it was necessary to wait a fixed mini-

mum time period for drying between pours (RT 377, 481-482). Accordingly, the work stoppages set back the progress of the concrete pouring thirty days with a resulting thirty-day delay in completing the entire project.

As a result of this delay the government extended the project completion date a total of thirty-five days (CT 65, par. 3) thereby recognizing not only the thirty-day delay measured by the actual period of the work stoppages but an additional five-day delay because of loss of efficiency resulting from the September work stoppage (RT 482). The factors which contributed to this efficiency loss were stated by appellees' project manager (RT 486-490, 498-499) and are discussed in detail below. The court found that the loss of efficiency delayed completion of the project by only an additional two and one-half days (CT 69, par. 2).

Having established the period of the delay the court then determined the amount of damages attributable to the delay (CT 70-71). Appellees submit that the evidence was more than sufficient to sustain the court's findings as to the amount of damages.

A. The evidence supported the lower court's award of damages for overhead salaries, property maintenance wages and other miscellaneous costs.

During the work stoppage periods, appellees continued to pay the salaries of overhead personnel who were required to be retained on the job to perform administrative, field supervision, engineering, warehouse, safety, first aid, guard and surveying functions (Exhibit 70, p. 3; RT 491-493, 500). The amount of these over-

head salaries included in the award of damages and references to the evidence supporting that amount are shown in Appendix I, Item 1. This amount did not include overhead salaries of personnel who were engaged in supervising the excavation portion of the work which continued in June (Exhibit 70, p. 3).

During the same periods, appellees continued to pay wages to personnel who were retained on the job to perform operation and maintenance functions which were required to be performed on a continuing basis, whether or not other work continued (Exhibit 70, pp. 3, 4 and 5; RT 500-501). The amounts included in the award of damages for these functions and the transcript references to the evidence supporting those amounts are shown in Appendix I, Items 2(a) through (e).

Appellees also incurred expenses of a continuing nature for insurance, sanitation, electricity, telephone, home office and transportation for the additional period of the delay (Exhibit 70, pp. 5-6; RT 501, 506-508). The amounts included in the award of damages for these items and the transcript references to the evidence supporting those amounts are shown in Appendix I, Items 3(a) through (f).

The authorities support the right of a party to recover damages for fixed expenses and overhead costs paid during a period when he is receiving no return or less than full return, in productive labor.

In *United Electrical R. & M. Workers v. Oliver Corp.*, 205 F. 2d 376 (8th Cir. 1953), the court awarded plaintiff damages caused by a partial shutdown of its plant

during an 18-day strike. These damages included "the expense of maintaining the plant, the salaries of supervisory and professional employees and other essential personnel necessarily retained by the company while the strikes were in progress, property insurance, property taxes, compensation and group insurance, social security taxes, and employees pension liability."

In *Plumbers and Steamfitters Union, Local No.* 598 v. *Dillon,* 255 F. 2d 820, 823 (9th Cir. 1958), this court approved a damage award which included expenses for rent, electricity and telephone services incurred during a period when plaintiff's operation was shut down because of the Union's breach of a contract to supply labor.

This court also affirmed an award of damages for overhead costs and other fixed expenses in *International Brotherhood v. Morrison-Knudsen Co.,* 270 F. 2d 530 (9th Cir. 1959). The damages awarded in that case included overhead salaries, telephone expense, general administrative expense, office rent, transportation expenses and other fixed expenses. See also, *International Union of Operating Eng. v. Dahlem Construction Co.,* 193 F. 2d 470, 472 (6th Cir. 1951); and *Structural Steel and O. I. Ass'n v. Shopmens Local Union,* 172 F. Supp. 354, 361 (D.C. N.J. 1959).

Appellees incurred other additional expenses as a result of the work stoppages. One of these expenses resulted from wage increases which became effective after the work stoppages for various employees, who, but for the work stoppages, would have performed work during

a prior period when the lower wage rates were in effect (Exhibit 70, p. 6; RT 522-523; CT 65). The amount included in the court's award of damages and the transcript references to the evidence supporting that amount are shown in Appendix I, Item 4. The court's award of damages for this additional expense was proper and is supported by *International Brotherhood v. Morrison-Knudsen Co.*, 270 F. 2d 530 (9th Cir. 1959); and *International Union of Operating Eng. v. Dahlem Construction Co.*, 193 F. 2d 470 (6th Cir. 1951).

Another additional expense which was included in the court's damage award (Appendix I, Item 5) resulted from the fact that appellees were required by contract specifications to sandblast the surface area of certain concrete which had been poured prior to the work stoppages (Exhibit 70, p. 7). The parties agreed that appellees incurred the amount of the additional expense which the court allowed (CT 65, par. 5).

The last item of damages listed in Appendix I (Item 6) was based on the court's award of interest at six per cent per annum on certain capital in the form of cash, inventories and retainages which appellants' unlawful conduct deprived appellees from using for the period of the delay. The court reduced the amount claimed for this item by 50 per cent despite the fact that in computing their claim, appellees used the average amount of cash on hand and the minimum amount of retainages which the parties had agreed upon (CT 65-66, par. 7).

This method of compensating a party who has been

wrongfully deprived of the use of money or other types of investment capital is proper. In *Local Union* 984 *Int. Bro. of Teamsters, Etc. v. HumKo Co.,* 287 F. 2d 231 (6th Cir. 1961), cert. denied, 366 U.S. 962, 81 S. Ct. 1922 (1961), the court affirmed an award of damages which included interest at six per cent per annum on the amount of retainage held on the date the strike commenced. This court also affirmed an award which included damages measured by interest on invested capital in *International Brotherhood v. Morrison-Knudsen Co.,* 270 F. 2d 530 (9th Cir. 1959).

B. The evidence supported the lower court's award of damages for loss of efficiency.

Appellees' evidence established that as a result of defendants' unlawful conduct they suffered a loss of efficiency. They contended this delayed completion of the job for a period of five days. On the basis of this contention, the government granted them an additional five-day extension of time in which to complete the contract (CT 65, par. 3). The court found that the loss of efficiency delayed completion of the project by only two and one-half days (CT 69, par. 2). On the basis of this finding, it awarded appellees damages for the wages and salaries paid for the additional two and one-half days.

Appellants assert in their brief that appellees' evidence failed to establish any loss of efficiency. In effect, appellants' entire argument on this point is that appellees did not establish the *same type* of efficiency loss which resulted in an award of damages in *International Brotherhood v. Morrison-Knudsen Co.,* 270 F. 2d 530

(9th Cir. 1959), *Carpenters Union, Local* 131 *v. Cisco Construction Co.,* 266 F. 2d 365 (9th Cir. 1959), cert. denied, 361 U.S. 828, 80 S. Ct. 75 (1959), and *Curtis v. Puget Sound Bridge and Dredging Company,* 133 Wash. 323, 233 Pac. 936 (1925). But appellees are not required to show and do not contend that their loss of efficiency resulted *primarily* from difficulty and delays in getting men back to work as in *Morrison-Knudsen* and *Cisco* or from mud and slime as in *Curtis*. On the contrary appellees' evidence established that their loss of efficiency resulted from a number of factors.

First, work did not cease abruptly but was preceded by a slowdown in both June and September (RT 486, 82, 86, 87, 96-98). Second, immediately following the work stoppages all of the members of particular crews did not return to work (Exhibit 71, p. 2; RT 487) and people who had been working together as a team prior to the strike were reorganized into different crews which were not as efficient (RT 486-487). Third, because of the fact that all possible concrete had been poured prior to the work stoppages, it was necessary, after the work resumed, for crafts other than carpenters to wait for new forms to be built before they could work at full capacity (RT 487-488). Another factor which was considered in determining the loss of efficiency was that work which otherwise would have been done during the summer was required to be done during winter months when labor is less efficient and pouring costs are increased considerably (RT 488-490, 499).

Appellees submit that this evidence was more than

sufficient to support the court's finding as to the damages resulting from loss of efficiency. See, *Merritt, Chapman & Scott Corp.* v. *Guy F. Atkinson Co.*, 295 F. 2d 14 (9th Cir. 1961).

C. Rental value is a proper measure of damages for the loss of use of equipment.

The last item of damages which the court awarded and which appellants assert was improper was for the loss of use of equipment that was either idled during the work stoppage periods or was required to be worked an additional period of time as a result of the work stoppages. As discussed in our opening brief above, the court reduced the amount which it determined was the reasonable rental value of the idled equipment by 50 per cent because of absence of use. Except for this reduction, the court's award of damages for loss of use of equipment was supported by the evidence and was not clearly erroneous.

Contrary to appellants' assertions, it is evident that appellees were in fact damaged as a result of being deprived of the use of their equipment during the period of appellants' unlawful conduct. This is obviously true with respect to the equipment which was subjected to periods of enforced idleness during the work stoppages since that equipment would otherwise have been working on the job during those periods. It is also true of the equipment which appellees were required to maintain on the job and operate an additional period of time.

This evidence of loss of or prevention of use estab-

lishes the right to recover the value of the loss of use. The general rule applicable in tort actions is stated in Restatement, Torts, Sec. 931 (1939), as follows:

> "§ 931. Detention of Land or Chattels.
>
> "Where a person is entitled to a judgment for the detention of, or for *preventing the use of,* land or chattels, the damages include an amount for
>
> "(a) the value of the use during the period of detention or prevention, or the value of the use of or the amount paid for a substitute, . . .
>
> * * * * *
>
> *"Comment:*
>
> "a. The rule stated in this Section applies where a tort-feasor has converted a chattel which has come back to the owner's possession, either through self-help, judicial proceedings or otherwise, *and where the conduct which deprived the owner of the use of a chattel was not a conversion."* . . . (Emphasis supplied.)

This principle was applied in *Holmes v. Raffo,* 60 Wn. 2d 421, 374 P. 2d 536 (1962), where the court held that the plaintiff was entitled to recover the value of the loss of use of a pleasure automobile during the time it was being repaired. The court quoted with approval the following statement from *Cook v. Packard Motor Car Co. of New York,* 88 Conn. 590, 92 Atl. 413 (1914):

> ". . . The value of an article to its owner, as Sedgwick points out, lies in his right to use, enjoy and dispose of it. These are the rights of property which ownership vests in him, and whether he, in fact, avails himself of his right of use does not in the least affect the value of his use. 1 Sedgwick on Damages (9th Ed.) § 243a. His right to the use of his property is not diminished by the use the owner

> makes of it. His right of user, whether for business or pleasure, is absolute, and whoever injures him in the exercise of that right renders himself liable for consequent damage. . ." (374 P. 2d at page 541.)

As discussed in our opening brief, appellees proposed alternative methods of measuring the value of this loss of use. The lower court adopted the cost of ownership measurement based on the formula published by Associated General Contractors of America, Inc. (Exhibit 62, RT 1171-1172). In their brief (pp. 55-56) appellants object to the "rentals" which result from the use of those rates despite the fact that the parties stipulated that both the A.E.D. and A.G.C. rates shown on Exhibit 68, Schedule K, would have been reasonable charges for appellees' equipment if it were rented (RT 497-498). This stipulation was made after the witness, Roy F. Johnson, had testified at length as to the amount of rent which appellees' equipment would have commanded in the Ice Harbor area (RT 445-465).

The ordinary method of measuring the value of the loss of use of equipment in a case such as this is rental value as demonstrated in the labor and Court of Claims cases hereafter discussed.

In *Denver Building and Construction Council v. Shore,* 287 P. 2d 267 (Colo. 1955), plaintiff sought to recover damages caused by defendant's unfair labor practice which resulted in idling heavy equipment on the job. The court held that the proper measure of damages was the fair rental value of the equipment during the period plaintiff was prevented from using it.

In answer to defendant's contention that the damages should be measured by loss of profits, the court said (at page 273):

> "It is impossible to allocate to each of several heavy machines on the job the proportion of the over-all profit attributable to the agency of each thereof. Apparently for this reason the rule has generally been adopted that where through unlawful or wrongful acts of defendants heavy equipment has been kept idle and the work expected to be accomplished thereby delayed, the fair rental value of such equipment during the period of prevention of its use is generally adopted as a proper measure for determination of the extent of damage.
>
> * * * * *
>
> "Highway construction machinery has a well-established, recognized rental value which, in this case, was testified to by competent disinterested witnesses.
>
> * * * * *
>
> "While it is true that the loss of use rule in the calculation of damage under circumstances as here detailed is more usually applied to instances where actual possession of the property is taken and detained by defendants and plaintiff is totally deprived thereof, we fail to see any merit in defendants' contention in the instant case that plaintiff retained actual possession of his machines and equipment. While it is undoubtedly true that defendants did not actually take possession of said equipment, they deprived plaintiff of the use thereof just as effectively as if they had put it under lock and key. When the members of the Engineers' Union violated their contract and walked off the job, individually refused to cross the picket line and, supported by the union in refusing to furnish union members to operate said machines, they completely immobilized and rendered entirely useless all of said machinery to the same extent as though it had

> been retained in their possession and actually impounded. It is simply a difference in the method of depriving the plaintiff of the use of his property and is ineffective to relieve defendants of liability for their breach of contract."

In *Local Union,* 984 *Int. Bro. of Teamsters, Etc. v. HumKo Co.,* 287 F. 2d 231 (6th Cir. 1961), cert. denied, 366 U.S. 962, 81 S. Ct. 1922 (1961), the court affirmed an award of damages which included rental value for loss of use of equipment that had been idled during a work stoppage caused by the union's unlawful secondary boycott activity. Commenting on the contention that the damage awards were excessive, the court said (at page 242):

> "Responsible officials of HumKo testified as to losses sustained by that company through the work stoppage brought about by the secondary boycott; Mr. Kuhne . . . who had a background of thirty years as a contractor, testified as to the reasonableness of the charges for equipment that was idled by the work stoppage."

Another recent case in which rental value for idled equipment was used as the measure of damages caused by an unfair labor practice is *Wells v. International Union of Operating Engineers,* Local 181, 206 F. Supp. 414, 418 (W.D. Ky. 1961), aff'd, 303 F. 2d 73 (6th Cir. 1962). Here the court accepted testimony of the plaintiffs as to the reasonable rental value of the equipment as proof of the extent of the loss.

Damages measured by rental value for the loss of use of equipment were also awarded by the trial court in *Morrison-Knudsen Company, Inc. v. International*

Brotherhood of Teamsters, Etc., Civil No. 1105 (Supplemental Findings of Fact, paragraph I, Item 8). Despite the union's claim on appeal in that case that the A.G.C. and A.E.D. "rental rates" were not the proper measure of damages for idled equipment, this court affirmed the award. *International Brotherhood v. Morrison-Knudsen Co.*, 270 F. 2d 530 (9th Cir. 1959).

This same measure was applied in the Court of Claims cases discussed in our opening brief where, because of the government's unauthorized stop order or other breach of contract, work on the project was delayed and equipment either idled or held on the job for an additional period of time. See, *Brand Inv. Co. v. United States,* 58 F. Supp. 749 (Ct. of Cl. 1944); *Warren Bros. Roads Co. v. United States,* 105 F. Supp. 826, 830 (Ct. of Cl. 1952); *Henry Ericsson Co. v. United States,* 62 F. Supp. 312 (Ct. of Cl. 1945); and *Morrison-Knudsen Co. v. United States,* 84 F. Supp. 282 (Ct. of Cl. 1949).

Appellants' arguments that rental value was an inappropriate method of measuring the value of the loss of use in this case have no merit. Aside from matters already discussed above, the only "argument" found in Exhibit 74, which appellants state contains their principal argument, is the accountant's legal opinion of the proper method of measuring loss of use (p. 18). Appellants advance no authority to support this opinion and it is contrary to the authorities discussed above.

The other argument advanced by appellants is that appellees did not show that they would have or could

have rented the equipment or used it elsewhere "during the dispute" or "after completion . . . of the . . contract." Of course, if appellees could have rented or used the equipment elsewhere during the dispute they would have been required to have done so in order to avoid their damages. It is admitted by appellants that appellees could not have done so. Any argument concerning what appellees would or could have done with the equipment after completion of the contract is completely out of place here. The argument certainly has no merit with respect to the equipment which the court found was idled during one or both work stoppage periods (CT 69, par. 3). The damages with respect to that equipment were sustained in June or September, 1957, when appellants prevented its use by appellees in an income operation. The argument has no more merit with respect to the equipment which the court found was worked continuously (CT 69-70, par. 4). That equipment was required to be used an additional period of time as a result of the work stoppages.

Furthermore, the argument that appellees were required to show that they could have rented or used the equipment elsewhere is not supported by the authorities. In *Brand Inv. Co. v. United States,* 58 F. Supp. 749, 751 (Ct. of Cl. 1944), the court rejected the contention that damages should not be awarded because "plaintiff was not in the business of renting machines to others; that it would, probably, not have rented them even if they had not been tied up on this job by the indefiniteness of the duration of the stop order; that it has not

shown that it had any other job on which it could have used them itself if they had not been tied to this job."

Moreover, Restatement, Torts, Sec. 931 (1939), refutes appellants' contention. Comment on Clause (a) states:

> "b. The owner of the subject matter is entitled to recover as damages for the loss of the value of the use, *at least the rental value of the chattel* or land *during the period of deprivation.* This is true *even though the owner in fact has suffered no harm through the deprivation as where he was not using the subject matter at the time* or had a substitute which he used without additional expense to him . . . (Emphasis supplied.)

On the basis of the foregoing, appellees submit that the court's use of rental value as the measure of the damages sustained by appellees as a result of the loss of use of their equipment was proper.

CONCLUSION

Appellees respectfully submit that the portion of the District Court's judgment which resulted in a reduction of appellees' damages by the amount of $40,000, in mitigation of damages, should be set aside and that appellees' judgment should be increased by $40,000 together with a reasonable profit markup of ten per cent on damage Items 1 through 7 (CT 70), interest at six per cent per annum on the total amount of damages from January 1, 1959, to February 21, 1963, and the sum of $38,695 as additional damages for the loss of use of equipment idled by the work stoppages.

In all other respects the District Court's findings of fact and conclusions of law in support of the judgment were supported by the evidence and the law and, subject to the above modifications, the court's judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

CHARLES J. McMURCHIE
Of Attorneys for
Appellees-Appellants

APPENDIX I

Item	*Amount Allowed*	*Transcript References To Evidence Supporting Amount*
1. Overhead salaries	$30,007.56	Exhibit 69, Item 1. See also, CT 64.
2. Property maintenance wages for:		
(a) Maintenance of pumps	6,624.29	CT 64.
(b) Electrical installation system	5,848.11	Exhibit 68, Item 2(b) p. 2, Schedule B.
(c) Air and water lines	2,241.30	Exhibit 68, Item 2(c), p. 2, Schedule C.
(d) Concrete curing	872.13	CT 64.
(e) Batch plant	1,077.00	Exhibit 68, Item 2(c), p. 2, Schedule E; Exhibit 69, p. 2
3. Miscellaneous costs for:		
(a) Insurance	3,360.00	Exhibit 67.
(b) Sanitation	815.41	CT 64.
(c) Electric power	6,258.00	CT 64.
(d) Telephone and teletype	593.70	CT 64.
(e) Home office expense	8,750.00	Claim of $17,500 (CT 64) reduced 50% (RT 1155)
(f) Transportation expense	1,866.00	CT 64
4. Wage increases after January 1, 1958	8,056.55	Claim of $18,798.62 (CT 65, par. 4, Exhibit 68, Item 5) reduced to 30 days and then by 50% (RT 1144, 1155-1156).
5. Sandblasting	3,828.25	CT 65, par. 5.
6. Interest on invested capital	3,119.50	Claim of 6,239.00 (CT 65-66, par. 7, Exhibit 68, Item 8, Exhibit 70, p. 8) reduced 50% (RT 1145, 1156).